Approved For Release 2001/08/23 : CIA-RDP57-00384R001000020083-0

OGC Has Reviewed

[redacted]

Re Recommendations by Interdepartmental Intelligence Committee for the Improvement of National Security.

The accompanying draft of a bill is designed to embody all of the recommendations of the Committee except Recommendations I and III.

It is suggested that Recommendation I is unnecessary, since, under existing law, proof of "intent" or "reason to believe" is not required with respect to offenses specified in clauses (d) and (e) of Section 31, Title 50, of the United States Code. This section defines five different crimes, with each one set off by a letter in parentheses and a semicolon, thereby making each offense separate and distinct. Neither clause (d) or (e), unlike the preceding clauses, requires any "intent" or "reason to believe" as an element of the offense, and it is believed to be very unlikely that the courts would construe the language of the statute otherwise.

It is suggested that Recommendation III might have an effect contrary to its purpose. Experience has shown that juries are extremely reluctant to convict an individual where the death penalty is involved, and it is believed that during peace time, in the absence of any obvious threat to national security, juries would be more likely to acquit than to convict if a verdict might result in the execution of the offender. Moreover, such a penalty would probably cause the peace time spy to operate more cautiously than he does already, thus making this detection and apprehension all the more difficult. However, this office concurs in Recommendation III to the extent that prosecution of espionage violations should be excepted from the operation of the statute of limitations, and provision has been made in the accompanying draft (Sections 2 and 3) to effectuate this purpose.

Although section 7 of the draft is designed to carry out Recommendation VII by amending Section 97(a), Title 10, of the United States Code, so as to invest the authority of the statute in the Secretary of War or any military commander designated by him, there is considerable doubt regarding the constitutionality of the operation of the statute during peace time. The authority of the Secretary of War under the statute as it now exists is necessarily predicated on an executive order of the President. The executive order which authorized the designation of military areas and the issuance of security regulations pertaining thereto was based solely upon the war power. The decisions of the Supreme Court and the lower federal courts upholding the constitutionality of these orders and regulations were also based on the war power. The most extensive

Approved For Release 2001/08/23 : CIA-RDP57-00384R001000020083-0

Approved For Release 2001/08/23 : CIA-RDP57-00384R001000020083-0

and perhaps best known exercise of this authority was that which required the evacuation of all persons of Japanese descent from the west coast during the recent war. In the case of Korematsu v. United States (323 U.S. 214), the Supreme Court stated, "We uphold the exclusion order as of the time it was made and when the petitioner violated it. ..... Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direct emergency and peril, is inconsistent with our basic governmental institutions."

In view of the Supreme Court's holding, it is somewhat doubtful whether any court would sustain the constitutionality of this section in peace time even if the authority to invoke its provisions remained in the hands of the President. In fact, it has been suggested by the Criminal Division of this Department that it might be advisable to delete section 7 from this proposed bill and submit it as a separate bill, so that the question of its constitutionality would not jeopardize favorable consideration of the entire proposal. Whether the Court's consideration of the statute would be different in the light of the swift and more devastating weapons of war which have become known since the decisions regarding the statute were handed down, is, of course, speculative.

In any event, it has been deemed advisable to include a provision which would preserve the remainder of Section 7 in case that any application of it to a particular circumstance should be held invalid.

Approved For Release 2001/08/23 : CIA-RDP57-00384R001000020083-0